

Pursuant to Ind.Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**SUSAN K. CARPENTER**  
Public Defender of Indiana

**CARA SCHAEFER WIENEKE**  
Deputy Public Defender  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ARTHUR THADDEUS PERRY**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANTOINE D. HILL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0612-CR-748

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
The Honorable Kathleen A. Sullivan, Magistrate  
Cause No. 45G01-0305-FA-18

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**August 7, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Antoine D. Hill (“Hill”) appeals the trial court’s denial of his Verified Motion for Permission to File Belated Notice of Appeal (“Second Petition”) under Indiana Post-Conviction Rule 2(1) (“P-C.R. 2(1)”), which Hill filed as an attempt to belatedly appeal the trial court’s denial of his prior Petition for Permission to File a Belated Direct Appeal (“First Petition”). We conclude that the trial court did not err in denying Hill’s Second Petition because P-C.R. 2(1) limits a trial court’s consideration of belated appeals to direct appeals challenging convictions and sentences and Hill’s Second Petition is not a direct appeal challenging his conviction or sentence. We therefore affirm the judgment of the trial court.

## **Facts and Procedural History**

On June 11, 2004, Hill pled guilty to one count of Attempted Murder, a Class A felony,<sup>1</sup> and two counts of Attempted Battery as a Class C felony.<sup>2</sup> On August 12, 2004, the trial court sentenced Hill to forty years for Attempted Murder and six years for each Attempted Battery, sentences to run consecutively, for a total term of fifty-two years in the Department of Correction.

On July 3, 2006, Hill, by counsel, filed his First Petition in which he requested permission to pursue a belated direct appeal of his sentence under P-C.R. 2(1). On September 26, 2006, the trial court held an evidentiary hearing on Hill’s petition and denied it in its September 29, 2006, Order. Hill attempted to appeal the trial court’s September 29, 2006, Order but failed to timely file his notice of appeal within thirty days

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<sup>1</sup> Ind. Code § 35-41-5-1; Ind. Code § 35-42-1-1.

<sup>2</sup> I.C. § 35-41-5-1; Ind. Code § 35-42-2-1.

from the date of the trial court's order. Thereafter, on November 3, 2006, Hill filed his Second Petition in which he requested permission to pursue a belated appeal of the trial court's denial of his First Petition. In his Second Petition, Hill's attorney stated that a notice of appeal from the trial court's denial of his First Petition was not timely filed within the requisite thirty days due to counsel's "inadvertent failure to calendar the date." Appellant's App. p. 75. Furthermore, Hill's attorney stated, "The failure to file a timely Notice of Appeal was not due to the fault of [Hill]. Petitioner Hill has been diligent in requesting permission to file a belated appeal from the negative judgment." *Id.* On that same day, the trial court denied Hill's Second Petition "for the reason that [it is] not timely filed." *Id.* at 74. Hill now appeals the trial court's November 3, 2006, Order, which denied him permission to file a belated appeal of the denial of his First Petition.

### **Discussion and Decision**

On appeal, Hill raises a single issue: Whether the trial court erred in denying his Second Petition under P-C.R. 2(1). Where, as here, a trial court does not conduct a hearing on a petition for permission to file a belated notice of appeal, we review the trial court's decision regarding the petition *de novo*. *Perry v. State*, 845 N.E.2d 1093, 1095 (Ind. Ct. App. 2006), *trans. denied*.

Initially, we pause to make clear that Hill's appeal addresses *only* the trial court's denial of Hill's Second Petition, ordered on November 3, 2006. Thus, this opinion *does not* address the merits of the trial court's denial of Hill's First Petition, ordered on September 29, 2006.

P-C.R. 2(1) provides, in pertinent part:

An “eligible defendant” for purposes of this Rule is a defendant who, but for the defendant’s failure to do so timely, would have the right to challenge on direct appeal a *conviction or sentence* after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Where an eligible defendant *convicted after a trial or plea of guilty* fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

(Emphases added). Thus, the plain language of P-C.R. 2(1) provides a method for seeking permission for belated consideration of appeals addressing convictions and sentences, but does not permit belated consideration of appeals of other post-judgment petitions. *See Greer v. State*, 685 N.E.2d 700, 702 (Ind. 1997); *Davis v. State*, 771 N.E.2d 647, 649 (Ind. 2002) (holding P-C.R. 2(1) “provides petitioners with a method to seek permission for belated consideration of appeals addressing conviction, but does not permit belated consideration of appeals of other post-judgment petitions. More specifically, the Court of Appeals lacks subject matter jurisdiction over appeals other than direct appeals, unless such appeals or petitions are timely brought.”); *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004) (providing that P-C.R. 2(1) is also available when a petitioner challenges a sentence).

While Hill acknowledges that P-C.R. 2(1) is limited to consideration of direct appeals addressing convictions and sentences, he argues that his Second Petition “is, in essence, an extension of [his] first petition related to directly appealing his sentence”

because “he filed a second Petition requesting Permission to File a Belated Notice of Appeal so that he could seek appellate review of the court’s denial of his request to directly appeal his sentence.” Appellant’s Br. p. 7-8. We disagree.

P-C.R. 2(1) specifically states that an “eligible defendant for purposes of this Rule is a defendant . . . who would have the right to challenge on direct appeal a *conviction or sentence* after a trial or a plea of guilty . . . .” (quotations omitted) (emphasis added). Moreover, our Supreme Court has stated that P-C.R. 2(1) does not permit belated consideration of appeals of other post-judgment petitions outside of those regarding conviction and sentence. Hill’s Second Petition is not a direct appeal of his conviction or his sentence but rather is a request for permission to file a belated notice of appeal of the trial court’s initial denial of his First Petition. We agree with the State that “if this were an appeal of his conviction or sentence, [Hill] would receive some sort of relief from his conviction or sentence if he prevailed.” Appellee’s Br. p. 5. Here, if Hill were to prevail, he would not derive any relief from his conviction or sentence; he merely would be allowed to proceed with his appeal challenging the trial court’s denial of his first belated notice of appeal. Because Hill’s Second Petition is not a direct appeal of his conviction or sentence, it is outside the purview of P-C.R. 2(1).<sup>3</sup> Thus, the trial court did not err in denying Hill’s Second Petition.

Affirmed.

SULLIVAN, SR. J., and ROBB, J., concur.

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<sup>3</sup> Nevertheless, our decision herein does not necessarily leave Hill without a remedy. Hill may seek post-conviction relief for ineffective assistance of counsel under Indiana Post-Conviction Rule 1(a)(1). Because Hill has a remedy, we decline to exercise any inherent power we may have to hear this appeal.

